DATE: August 28, 1995
CASE NOS. 91-ERA-31
91-ERA-34

IN THE MATTER OF

GEORGE M. GILLILAN,

COMPLAINANT,

v.

TENNESSEE VALLEY AUTHORITY,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

DECISION AND REMAND ORDER

Complainant, George Gillilan, filed these two complaints pursuant to the whistleblower provision of the Energy Reorganization Act of 1974, as amended, (ERA), 42 U.S.C. § 5851 (1988).[1] After Gillilan requested hearings on each complaint, the Administrative Law Judge (ALJ) issued an order consolidating both cases. Since the cases ultimately were pursued and handled disjunctively, they are hereby severed for decision.

Prior to the hearing, Respondent, Tennessee Valley Authority (TVA), filed a motion for summary judgment on those claims raised in Case No. 91-ERA-31. The ALJ granted TVA's motion and issued a [Recommended] Order Granting Partial Summary Judgment (R. O.), dated November 26, 1991. On January 7, 1992, the ALJ issued a Recommended Order of Dismissal for Case No. 91-ERA-34, under Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure. The ALJ's recommended decisions are now before me for review pursuant to 29 C.F.R. § 24.6(a) (1994).

Case No. 91-ERA-34

After the ALJ issued his ruling on the summary decision motion (91-ERA-31), the parties submitted a joint stipulation

requesting dismissal of the complaint in Case No. 91-ERA-34. The stipulation appears to meet the terms of Fed. R. Civ. P. 41(a)(1)(ii), which has been held applicable in these circumstances, and accordingly, I dismiss Case No. 91-ERA-34

without prejudice. *Bauer v. Power Resources, Inc.*, Case No. 94-ERA-10, Sec. Order, June 24, 1994, slip op. at 1-2; *Galata v. Tennessee Valley Authority*, Case No. 91-ERA-0028, Sec. Order, May 20, 1992, slip op. at 2.

Case No. 91-ERA-31

In this complaint, dated November 16, 1990, Gillilan alleges that he has been subjected to "a continuous pattern and series of acts" in retaliation for his reporting nuclear safety concerns and in contravention of a settlement agreement reached in a previous ERA case he filed against TVA. As "example[s]" of alleged retaliation, Gillilan included six specific acts: (1) his assignment to the evening shift on October 15, 1990; (2) improper handling of his service reviews; (3) failure to reinstate seniority and overtime; (4) continuing failure to provide requisite training, such as courses in elevator repair, crane maintenance, and diesel generators; (5) insufficient credit and payment for Nuclear Accreditation Bonus (NAB) qualifications;[2] and (6) continuing harassment and intimidation by a supervisor.

TVA argues that summary judgment is appropriate because the claims are either untimely filed, not cognizable under the ERA, or indisputably nondiscriminatory. In support of its motion, TVA submitted Gillilan's deposition and an affidavit of Edwin B. Ditto, one of Gillilan's supervisors. Gillilan opposed the motion by submitting his own affidavit and emphasizing his continuing violation allegation. Gillilan claims that each of the six claims are part of a continuing violation related to the retaliatory loss of training opportunities. He also alleges that his previous attorney missed the filing deadline because he was suffering from mental incapacity, which Gillilan asserts should toll the statutory filing period.

The ALJ found that Gillilan's first, third, fifth, and sixth claims, and part of his fourth claim relating to training in elevator repair, were untimely filed. R. O. at 4. He rejected Gillilan's tolling argument, finding it unsupported by both the law and the evidence. Although the ALJ found that Gillilan's second claim and the portion of his fourth claim relating to training in crane maintenance and diesel generators were timely filed, he concluded that Gillilan had not alleged facts that support a rational inference, and *prima facie* case, of retaliation. As a consequence, the ALJ added, these timely claims cannot be used to preserve the untimely claims under a continuing violation theory. After reviewing the parties' submissions, I disagree with the ALJ's recommendation to grant

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summary decision.

The standard for granting summary decision is set forth at 29 C.F.R. § 18.40(d) (1994). *See, e.g., Webb v. Carolina Power & Light Co.*, Case No. 93-ERA-42, Sec. Dec., Jul. 17, 1995, slip op. at 4-6. This section, which is derived from Fed. R. Civ. P. 56, permits an ALJ to recommend summary decision for either party where "there is no genuine issue as to any material fact and . . . a party is entitled to summary decision." 29 C.F.R. § 18.40(d). Thus, in order for TVA's motion to be granted, there must be no disputed material facts and TVA must be entitled to prevail as a matter of law. *Richter v. Baldwin Assoc.*, Case No. 84-ERA-9, Sec. Dec., Mar. 12, 1986, slip op. at 3.

The non-moving party must present affirmative evidence in order to defeat a properly supported motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). It is enough that the evidence consist of the party's own affidavit, or sworn deposition testimony and declaration in opposition to the motion for summary judgment. *Celotex Corp.*, 477 U.S. at 324; *Foster v. Arcata Assoc., Inc.*, 772 F.2d 1453, 1461 (9th Cir. 1985), *cert. denied*, 475 U.S. 1048 (1986). The determination of whether a genuine issue of material fact exists must be made viewing all evidence and factual inferences in the light most favorable to Gillilan. *See OFCCP v. CSX Transp., Inc.*, Case No. 88-OFC-24, Asst. Sec. Dec., Oct. 13, 1994, slip op. at 12.

It is undisputed that Gillilan's first claim, that he was unlawfully reassigned to the evening shift, was not filed within thirty days of the date on which he received notice of the reassignment, as expressly required under the ERA at that time. 42 U.S.C. § 5851(b)(1).[3] The time limits, however, are subject to equitable modification. *Larry v. Detroit Edison Co.*, Case No. 86-ERA-32, Sec. Dec., June 28, 1991, slip op. at 12, *aff'd*, No. 91-3737 (6th Cir. Apr. 17, 1992); see *Rose v. Dole*, 945 F.2d 1331, 1335-36 (6th Cir. 1991).

The leading case on the issue of timeliness under the whistleblower provisions at 29 C.F.R. Part 24 *is School Dist. of Allentown v. Marshall*, 657 F.2d 16, 19-20 (3d Cir. 1981). In *Allentown*, at 19-20, the court noted the principal situations where tolling is appropriate, relying on *Smith v. American President Lines, LTD.*, 571 F.2d 102 (2d Cir. 1978), a case decided under Title VII of the Civil Rights Act of 1964. *Smith* interpreted Supreme Court precedent as implying that tolling might be appropriate only where the defendant actively misled the plaintiff respecting the cause of action; or where the plaintiff has in some extraordinary way been prevented from asserting his rights; or has raised the precise statutory claim in issue, but has mistakenly done so in the wrong forum.

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There is authority, at least in some jurisdictions, indicating that mental incapacity may fall within the "extraordinary" circumstances category outlined in *Smith*. *See, e.g., Moody v. Bayliner Marine Corp.*, 664 F. Supp. 232, 235 (E.D.N.C. 1987). Recently, the United States Court of Appeals for the Sixth Circuit, relying on *Moody* and *Burton v. United States Postal Serv.*, 612 F. Supp. 1057, 1059 (D.C. Ohio 1985), held that if a plaintiff pursued his claim diligently, yet was abandoned by his attorney due to his attorney's mental illness, equitable tolling of the limitations period may be appropriate under Title VII. *Cantrell v. Knoxville Community Dev. Corp.*, Nos. 94-5033/94-5379, 1995 U.S. App. LEXIS 17458, 3 (6th Cir. Jul. 19, 1995). The court remanded to allow the plaintiff an opportunity to present evidence of his attorney's mental state during the filing period. I will apply *Cantrell* to this case, which arises within the appellate jurisdiction of the Sixth Circuit, and remand for further consideration of the issue. Although the ALJ stated that

no evidence regarding the attorney's mental state at the time of the filing was presented, the record raises issues of material fact regarding the attorney's capacity and Gillilan's diligence.[4] Consequently, it cannot be concluded at this stage that Gillilan's complaint was untimely filed, and summary decision is denied. Furthermore, there are issues of material fact regarding whether the reassignment was based on retaliatory motives, either directly, or indirectly through tainted seniority lists.

In addition, Gillilan is alleging that his reassignment to the evening shift was a continuation of harassment by his supervisor, Harry Brown, which began in January 1990. Since the ALJ found the evening shift allegation untimely, he did not consider Gillilan's harassment theory or whether a continuing violation exists. Viewing the evidence in the light most favorable to Gillilan, there are issues of material fact regarding whether, in retaliation for protected activity, Brown intimidated Gillilan during a January 1990 electrical training course; whether TVA then acted so as to affect Gillilan's NAB for retaliatory reasons; and whether these events are sufficiently linked to Gillilan's reassignment to the evening shift, again under Brown's supervision, to constitute a continuing violation. *See CSX Transp. Inc.*, slip op. at 21-26, discussing *Elliott v. Sperry Rand Corp.*, 79 F.R.D. 580, 585-86 (D. Minn. 1978); *see also English v. Whitfield*, 858 F.2d 957, 963-64 (4th Cir. 1988) (retaliatory harassment theory is cognizable under the ERA). If on remand the ALJ determines that the evidence supports tolling and jurisdiction to consider the evening shift allegation, then he must consider the continuing violation theory and whether it affects any relief available to Gillilan.

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The ALJ found that Gillilan's second claim regarding TVA's delay in reissuing his service review rating was timely filed, but that Gillilan failed to allege facts that would raise a *prima facie* case of retaliation. R. O. at 5-6. I agree, as clarified below.

Under the terms of the parties' settlement agreement in Case No. 89-ERA-40, which was signed on February 1, 1990, TVA agreed to reissue Gillilan's service review for the period from December 1987 through May 1988, with a rating of "Better Than Fully Adequate." TVA reissued the service review on October 23, 1990, less than thirty days before Gillilan filed this complaint. Gillilan alleges that TVA delayed in issuing the revised service review as a further reprisal for his protected activities and that during the period of the delay he was denied training opportunities based on the original, improper rating. TVA contends that the delay was not adverse to Gillilan and further, that the Secretary has no authority to adjudicate this claim, which is tantamount to a breach of settlement claim. The ALJ agreed with TVA. He viewed the claim as one to enforce the prior settlement agreement and stated, "[t]he mere fact that Complainant believes that Respondent acted with discriminatory motive in delaying the reissuance of the service report, does not convert this dispute from a breach of settlement claim to a

discriminatory act under the ERA." R. O. at 6.

Violation of a settlement may under some circumstances constitute a separate, independent violation of the ERA. *Blanch v. Northeast Nuclear Energy Co.*, Case No. 90-ERA-11, Sec. Order, May 11, 1994, slip op. at 4; *O'Sullivan v. Northeast Nuclear Energy Co.*, Case No. 90-ERA-35, Sec. Order, Dec. 10, 1990, slip op. at 3. Here, however, there was no final settlement agreement approved by the Secretary as required by the ERA.[5] Although TVA voluntarily reissued the service review, it was not obligated to do so for purposes of the ERA. *See Macktal v. Brown & Root, Inc.*, Case No. 86-ERA-23, Sec. Dec., Oct. 13, 1993, slip op. at 6 n.3. There is no allegation or indication that reissuing Gillilan's service review falls within the "terms, conditions, or privileges" of Gillilan's employment, independent of the settlement agreement. For these reasons, the delay in reissuing the rating does not constitute an adverse employment action within the purview of the ERA. *Compare Grizzard v. TVA*, Case No. 90-ERA-52, Sec. Dec., Sept. 26, 1991, slip op. at 2 (allegation that employer delayed implementation of *final* EEOC order for retaliatory reasons is within purview of ERA).

To the extent that Gillilan is alleging another violation -- denial of training opportunities -- based on the same alleged retaliatory policy or practice that he challenges in Case No. 89-ERA-40, summary dismissal of the claim is appropriate. Gillilan

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raises no specific allegation of a retaliatory act within thirty days prior to the complaint. In fact, Gillilan points to no specific training course for which TVA failed to schedule him prior to this complaint.[6]

I note, however, that Gillilan alleged another violation during his deposition which could render this complaint timely or form a basis for relief. In deposing Gillilan, TVA asked that he describe "each and every one" of the alleged discriminatory acts constituting the pattern and series of acts referred to in the complaint. Deposition (Dep.), dated June 5, 1991, at 5. In addition to the acts listed above in his November complaint, Gillilan explained that on three different occasions, within one year of his complaint, he had not been selected for the limitorque valve crew. Dep. at 9, 32. Gillilan could only speculate that one of the dates on which he was not selected was "October, November of '90," Dep. at 33, apparently because TVA never turned the information over through discovery. *See* Dep. at 34. Thus, there is some indication that Gillilan may not have had an opportunity for full discovery and that complete discovery may produce a timely discriminatory act.[7]

Accordingly, Case No. 91-ERA-31 is remanded to the Office of Administrative Law Judges (OALJ) for further proceedings, including an evidentiary hearing. In remanding this case, I reach no conclusions, nor should any be inferred, regarding the timeliness or the merits of the allegations. On remand I direct the Acting Chief ALJ first to review and decide whether to consolidate this case with Case No. 89-ERA-40, which remains pending before the OALJ. 29 C.F.R. § 24.5(b) (1994).

SO ORDERED.

ROBERT B. REICH
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1] The amendments to the ERA contained in the National Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (Oct. 24, 1992), do not apply to this case in which the complaints were filed prior to the effective date of the Act.

[2] The NAB is a bonus paid to those electrical maintenance craftsmen who meet and maintain certain eligibility requirements. TVA's Brief at 9.

[3] The amendments to the ERA changed the limitations period to 180 days. *See* Section 1902(i) of Pub. L. 102-486.

[4] In his affidavit Gillilan alleges that he raised the complaint with his attorney on October 26, 1990, and then on October 30, called to make sure the complaint had been filed. Gillilan alleges that the attorney was suffering from a manic-depressive condition that caused him to miss the deadline. There is evidence, even in this meager record, of the attorney's incapacity. On June 10, 1991, the first date set for hearing, the attorney suddenly abandoned Gillilan. Although the attorney conversed with Gillilan that morning, he later abruptly required medical treatment; failed to appear at the hearing; and disappeared for some period of time without notifying his office or the ALJ of his whereabouts. References concerning the attorney's personal problems and his psychiatric physician were made at that time. *See* transcripts dated June 10 and 11, 1991, at 7, 17. By June 17, the attorney was hospitalized for "major depression." *See* letters dated July 10, 1991, from George Gillilan to the ALJ and from W.P. Boone Dougherty to George Gillilan. The attorney withdrew from the practice of law in July 1991.

[5] On April 12, 1994, I disapproved the settlement agreement for purposes of resolving Case No. 89-ERA-40 because it made sealing the record, which I cannot do, an essential and nonseverable term. The case was remanded for further proceedings. On November 29, 1994, I denied TVA's motion to reconsider.

[6] In finding that Gillilan had not stated facts which would support a *prima facie* case with regard to training in crane maintenance and diesel generators, the ALJ was persuaded by TVA's argument that it treated Gillilan like other similarly

situated employees. R. O. at 5-6. However, a complainant need not show that he was "treated differently from other similarly situated employees" to establish a *prima facie* case of retaliation. *DeFord v. Secretary of Labor*, 700 F.2d 281, 286 (6th Cir. 1983); *Artrip v. Ebasco Services, Inc.*, Case No. 89-ERA-23, Sec. Dec., Mar. 21, 1995, slip op. at 9 n.4; *Helmstetter v. Pacific Gas & Electric Co.*, Case No. 91-TSC-1, Sec. Dec., Jan. 13, 1993, slip op. at 9. Inclusion of such a requirement among the elements of a claim would take no account of the possibility that more than one person might be exposed to the same type of discrimination. *DeFord*, 700 F.2d at 286.

[7] A motion for summary judgment may be continued or denied if the non-moving party has not had an opportunity to make full discovery. *Celotex Corp.*, 477 U.S. at 326.